No. 02-1551

Supreme Court, U.S.
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In The
Supreme Court of the United States

ESTHER L. GAYMAN,

Petitioner,

v.

PRINCIPAL FINANCIAL SERVICES, INC.,
Principal Financial Group, Inc., and
Principal Life Insurance Company,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Brief of Respondents ("Principal") serves to further demonstrate the importance of the question presented. The Petition argues that this Court's specific "reserve power" decision in *Phillips Petroleum v. Jenkins,* 297 U.S. 629, 634 (1936) and the specific *per se* Takings Clause analysis of *Brown v. Legal Foundation of Washington,* 123 S.Ct. 1406 (2003) apply to determine whether a mutual insurer acts as a "state actor" under 42 U.S.C. § 1983 in violation of the Takings and Contracts Clauses in a statutory demutualization.

Principal argues that the Seventh Circuit correctly applied general, non-Takings Clause state action precedent derived from *American Manufacturers v. Sullivan,* 526 U.S. 40 (1999); *Blum v. Yaretsky,* 457 U.S. 992 (1982) and *Rendell-Baker v. Kohn,* 457 U.S. 830 (1982), and that *Phillips* and *Brown* are irrelevant. The Second and Fifth Circuits held the same in cases in which Petitions For Certiorari are now pending before this Court. *Tancredi v. Metropolitan Life,* No. 02-1542 and *Campbell v. John Hancock,* No. 02-1681. The decisions of the Second, Fifth and Seventh Circuits appear to conflict with the Sixth Circuit's decision in *Ohio State Life Insurance Co. v. Clark,* 274 F.2d 771 (6th Cir. 1960) as well as this Court's decisions in *Phillips Petroleum* and *Brown.*

Because of the present conflict and the widespread importance of the question presented affecting the property rights of millions of mutual policyholders, it is respectfully submitted that this Court grant Certiorari.

I. The Brief In Opposition Demonstrates A Substantial Conflict As To Whether The State Action Question Is Subject To Specific Takings And Contracts Clause Precedent Applicable To Corporate Reorganizations Or More General Fourteenth Amendment Due Process State Action Precedent

As this Court has observed, ". . . if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the lower courts should follow the case which directly controls, leaving to this Court the prerogative of overruling its decisions." *Rodriquez de Ouijas v. Shearson/American Express,* 490 U.S. 477, 484 (1989).

Principal argues that the Seventh Circuit correctly found no state action because the state did not mandate or coerce the decision to demutualize. *Cf.* App. A, p. 3; Principal Br. at pp. 4-6. This Court's *specific* Takings Clause precedent demonstrates, instead, that state action is present where a permanent physical occupation of another's property is "authorized" or "merely permitted" by the government after request by the person seeking to take the property. *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 426 (1982). In *Loretto,* the state neither mandated nor coerced the cable company to occupy the property owners' rooftops. Instead, the cable company freely elected to occupy that property based upon the power and procedures in the state enabling act. *Id.* at 424. That the cable company in *Loretto* conducted itself as a "state actor" was unquestionable.

Under specific *per se* Takings case precedent, unlike the Fourteenth Amendment due process cases cited by Principal and the Seventh Circuit (Principal Br. at pp. 4-6),

the question is not whether the State "mandates" an actor to deprive another of property without notice or opportunity to be heard, *but rather whether the State has "enabled" or "authorized" the actor to cause an involuntary transfer of private property to another.* What was "mandated" or "coerced" in *Loretto* was the apartment owners' "forced acquiescence" to the occupation by the cable company. *See Yee v. City Of Escondido,* 503 U.S. 519 (1992). Here, what was "coerced" was the policyholders' forced relinquishment of their contractual rights. The fact that the decision to demutualize was voluntary is irrelevant, just as it is irrelevant that the cable company in *Loretto* voluntarily chose to utilize state created powers to take rooftop space. Because Principal allegedly used the state conversion law to "force" policyholders to give up their contractual interests, Principal exercised "state action" within the meaning of the Takings and Contracts Clauses.

It is respectfully submitted that whether Principal exercised "state action" and engaged in a *per se* Taking of property are important federal constitutional questions upon which this Court should grant Certiorari.

II. Respondents' State Remedies Defense Is Erroneous Under This Court's Precedent

Petitioner is not required to exhaust all other potential state remedies, as Principal now contends, in order to obtain damages under the Takings Clause. The lower courts properly addressed the merits. App. A, p. 3; B, p. 15. Although not raised in the court below, Principal suggests that a Takings claimant must exhaust all state remedies before resorting to the compensation remedy in the Takings

Clause. This Court rejected this argument in *Williamson County v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), explicitly ruling that "exhaustion of *review procedures*" was not required, citing *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982). *Id.* at 195, n.13.

Principal is wrong to argue that Iowa corporate legal protections are exclusive. The Takings Clause guarantees a *compensation* remedy for a Taking; therefore, making any state law remedy merely supplementary. *First English Evangelical Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304, 314-15 (1987); *Jacobs v. United States*, 290 U.S. 13, 27 (1933). As the Fourth Circuit in *Washlefske v. Winston*, 234 F.3d 179 (4th Cir. 2000) succinctly recognized, supplementary state remedies cannot subvert the remedy specifically guaranteed by the Takings Clause in stating:

> If we were, in this circumstance, to require Washlefske to file his claim first in a Virginia court, we would be transforming *Williamson County's* finality rule into a rule of exhaustion. This result would be in diametric opposition to a foundational decision of modern § 1983 jurisprudence, *Monroe v. Pape*, which held that "the federal remedy is supplementary to the State remedy, and the latter need not be first sought and refused before the federal one is invoked." 365 U.S. 167, 183 (1961).

234 F.3d at 183.

Williamson provides for a "prudential ripeness" rule of finality which was automatically satisfied here by the Commissioner's decision which authorizes the Taking and sets the amount of or method for determining the compensation to be made pursuant to the procedure in the Conversion

Law. App. G. *See also Suitum v. Tahoe Regional Planning*, 520 U.S. 725, 734 (1997). Further exhaustion of review procedures was not required. Review here was conditioned upon the plaintiff posting security for Principal's attorneys' fees, a condition most policyholders could not afford. App. 27. Petitioner naturally elected to pursue the unconditional remedy under the Takings Clause.

Under this rule of finality, once a state has determined to authorize a Taking *and* the designated state official has determined the amount of compensation, if any, that will be paid, a Takings Clause claim is ripe. In this sense, in a *per se* or "physical occupation" Takings case, ripeness exists as a matter of law when the property is transferred by government authority and the amount of compensation, if any, has been determined. *Washlefske v. Winston*, 234 F.3d 179, 183 (4th Cir. 2000). The Fourth Circuit in *Washlefske* explained that *Williamson* requires a determination as to whether a final decision by the state has been made authorizing a Taking *and* deciding the value of compensation, if any, to be paid:

> In this case, the finality of the State's position has not been questioned; the statute's language is clear and its impact upon Washlefske is uncontroverted . . . Not only is the State's use of the interest uncontroverted, but also its amount is readily calculable, more than satisfying the Supreme Court's prudential ripeness requirements.

Id. at 182-83. *See also Montgomery v. Carter County, Tennessee*, 226 F.3d 758, 765 (6th Cir. 2000) ("In holding that the tract owner's claim was not ripe, the Supreme Court took pains to distinguish the concept of finality from the somewhat related but distinct concept of exhaustion of state remedies"). By the Commissioner's order, the State

made a final decision allowing Petitioner to then pursue her Takings Clause compensation remedy.

Other circuit courts hold that *Williamson* provides a "rule of exhaustion." *Deniz v. Municipality of Guaynabo,* 285 F.3d 142, 146 (1st Cir. 2001) and *Daniels v. Area Plan Commission Of Allen County,* 306 F.3d 445, 453 (7th Cir. 2002). The question whether *Williamson* provides for a rule of finality or a rule of exhaustion is presented in the related Petition For Certiorari in *Campbell v. John Hancock,* No. 02-1681, filed on May 16, 2003.

CONCLUSION

Wherefore, it is respectfully requested that this Honorable Court accept Certiorari here and in the related cases of *Tancredi v. Metropolitan Life,* No 02-1542 and *Campbell v. John Hancock,* No. 02-1681, in which Petitions For Writ of Certiorari are pending, to address these important constitutional questions.

Respectfully submitted,

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